

[Case Title]Healey,Dtr/Pltf v MA Higher Education Assistance, Deft.

[Case Number] 91-30946

[Bankruptcy Judge] Arthur J. Spector

[Adversary Number] 92-3079

[Date Published] August 17, 1993

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

In re: ALICIA ELIZABETH HEALEY,

Case No. 91-30946  
Chapter 7

Debtor.

ALICIA ELIZABETH HEALEY,

Plaintiff,

-v-

A.P. No. 92-3079

MASSACHUSETTS HIGHER EDUCATION  
ASSISTANCE CORPORATION,

Defendant.

THE EDUCATION RESOURCES INSTITUTE, INC.

Plaintiff,

-v-

A.P. No. 92-3022

ALICIA ELIZABETH HEALEY,

Defendant.

APPEARANCES:

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Attorney for Debtor  
Resources

KENNETH W. KABLE  
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THOMAS J. BLEAU

**OPINION**  
**REGARDING DISCHARGEABILITY OF STUDENT LOANS**

Section 523(a)(8) provides in pertinent part that a student debt<sup>1</sup> is nondischargeable "unless-- . . . (B) excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents." The issue in these consolidated adversary proceedings is whether the Debtor qualifies for this undue-hardship exception.

The Debtor owes student debts totaling approximately \$43,000. Of this amount, about \$8,000 is owed to The Education Resources Institute, Inc. ("TERI"), and roughly \$35,000 is owed to the Massachusetts Higher Education Assistance Corporation ("MHEA"). The Debtor, who holds a masters degree in elementary education, is employed full time as a teacher in a local parochial school, and earns \$10,600 per year. The Debtor is also paid \$50 per week (\$1.25 per hour) to babysit the children of her former fiancé while school is in recess during the summer.

The Debtor testified at trial to the effect that, despite

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<sup>1</sup>This opinion uses the term "student debt" as a shorthand reference to "an educational . . . loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution." 11 U.S.C. §523(a)(8).

good-faith efforts on her part, she has been unable to secure a better-paying position in the educational field, and that she does not anticipate finding such a position in the foreseeable future. Similarly, she testified that the babysitting job is the only summer employment she has been able to find.

Before determining whether these facts establish an undue hardship, I must first define the appropriate standard for making that determination. In this regard, the court in *In re Johnson*,<sup>5</sup> B.C.D. 532 (Bankr. E.D. Pa. 1979) articulated a three-pronged test. Under the first prong, the "mechanical test," the court must determine whether "the debtor's future financial resources for the longest foreseeable period of time allowed for repayment of the loan . . . [is] sufficient to support the debtor and his dependent at a subsistence or poverty standard of living, as well as to fund repayment of the student loan." *Id.* at 544. The "good faith test" requires the court to consider whether "the debtor [was] negligent or irresponsible in his efforts to minimize expenses, maximize resources, or secure employment." *Id.* Under the "policy test,"

The court must ask: Do the circumstances--*i.e.*, the amount and percentage of total indebtedness of the student loan and the employment prospects of the petitioner indicate:

(a) That the dominant purpose of the bankruptcy petition was to discharge the student debt, or

(b) That the debtor has definitely benefited financially from the education which the loan helped to finance?

*Id.* Although *Johnson* is a pre-Bankruptcy Code case, its analysis has since been accepted in one form or another by a number of courts for purposes of §523(a)(8)(B). See, e.g., *In re Koch*, 144 B.R. 959, 963, 27 C.B.C.2d 1311 (Bankr. W.D. Pa. 1992); *In re Foreman*, 119 B.R. 584, 587 (Bankr. S.D. Ohio 1990); *In re Lohman*, 79 B.R. 576, 582-83 (Bankr. D. Vt. 1987).

In *In re Connor*, 83 B.R. 440 (Bankr. E.D. Mich. 1988), however, this Court suggested a different approach. There I determined that the undue-hardship exception was inapplicable because discharging the student debt would have no appreciable impact on the debtor's standard of living, let alone pose an undue hardship. My reasoning was as follows:

[W]e determine that this debtor's lot would not benefit in any cognizable fashion if the discharge she received over five years ago were determined to extend to these student loans . . . . In our view, a debtor without present income or wealth and without reasonable prospect of future income or wealth is not entitled to have his or her student loans declared discharged on account of "undue hardship"! We conclude thusly because of our recognition of one overriding practical imperative--a discharge of the debt is irrelevant. If a penurious debtor's student loans are wiped clean, will that debtor live any better? Of course not. The debtor would "take home" not one cent more on account of a discharge, since, by definition,

the debtor has no income (or an income so low as to be beyond the reach of garnishments); and there would be no non-exempt wealth to levy upon. In short, the uncollectible student loan debtor needs no discharge at all--be it for student loans or any other type of debt.

. . .

From a practical standpoint, if we were to agree that this debtor has no reasonable likelihood of obtaining gainful employment in the reasonably foreseeable future, we would have to hold that since she would not be harmed if the student loans remained her debts, hers is not an "undue hardship" case. At present, she is uncollectible . . . .

*Id.* at 444.

The analysis in *Connor* may differ from *Johnson* because the latter case was operating from a different premise. In *Johnson*, the court was concerned with whether "repayment [of the loan] would impose 'undue hardship.'" 5 B.C.D. at 544. That was logical because the relevant statute specified that a student debt could not "be released by a discharge in bankruptcy under the Bankruptcy Act . . . [unless] the court in which the proceeding is pending determines that *payment* from future income or other wealth will impose an undue hardship on the debtor or his dependents." 20 U.S.C. §1087-3(a) (repealed 1978) (emphasis added; *quoted in Johnson*, 5 B.C.D. at 532). Because that statute focused on the hardship caused by "payment" of the student debt, the approach taken by the court in *Johnson* seems straightforward.

In contrast to the foregoing statute, however, the undue-hardship exception now applies only if "*excepting [the student] debt from discharge . . . will impose an undue hardship.*" 11 U.S.C. §523(a)(8)(B) (emphasis added). Thus the Code shifts the focus from "payment" to "denial of discharge" in assessing what impact the court's determination could have on the debtor's standard of living.

This distinction is important because the fact that a discharge is denied does not necessarily mean that the debt in question will be paid. If the debtor is judgment-proof, as in *Connor*, then she can disregard her financial obligations with virtual impunity--whether discharged or not. The debtor's job, if she has one, is secure because Michigan law prohibits termination of employment or other disciplinary action based on the fact that an employee's wages have been garnisheed. See Mich. Comp. Laws §§600.4015 and 600.8307; cf. 15 U.S.C. §1674(a) (precluding "discharge [of] any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness"). Under such circumstances, the "denial of discharge" does not pose an undue hardship,<sup>2</sup> and a ruling by the court to that effect is both logical

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<sup>2</sup>One problem that might arise for a *Connor*-type debtor would involve collection calls, dunning letters and the like. See *Connor*, 83 B.R. at 444 n.2. But such irritations do not rise to the level of an undue hardship, particularly since debtors are generally protected by law from creditor harassment. See, e.g., 15 U.S.C. §1692d ("A debt collector may not engage in any conduct the

and entirely consistent with the text of §523(a)(8)(B).<sup>3</sup>

Of course, this is not to say that the *Johnson* test was rendered obsolete by the Code, or that it is incompatible with the *Connor* analysis. To the extent that a debtor has income or other assets subject to execution, the *Johnson* test can be utilized to determine whether the "payments"--either in the form of garnishment, execution sale, or conventional payments made by the debtor to avoid the foregoing--impose an undue hardship. By analyzing the problem in this fashion, the court can make a more accurate and realistic assessment of the effect that a denial of discharge would have on the debtor and her dependents. The first step in this case, then, is to determine whether the Debtor's wages are susceptible to

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natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."); Mich. Comp. Laws §445.252 (prohibiting a wide range of debt-collection techniques).

<sup>3</sup>The legislative history explains the undue-hardship exception as encompassing debtors who are "unable to earn sufficient income to maintain [themselves] and [their] dependents *and to repay the educational debt.*" *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. II at 140 n.15 (1973) (emphasis added); *see also id.* at 140-41 n.17 (referring to the debtor's ability to "maintain [himself] and his dependents, at a minimal standard of living . . . *as well as to pay the educational debt.*" (emphasis added)). But the assumption underlying these passages is that the debtor can be compelled to pay a nondischargeable debt, an assumption that is blatantly wrong in the case of a judgment-proof debtor. And I do not believe the quoted excerpts mandate that the court ignore this fact when determining the potential impact of its undue-hardship determination.

garnishment.<sup>4</sup>

Federal law specifies in pertinent part that:

[T]he maximum part of the aggregate disposable earnings<sup>[5]</sup> of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings are payable,

whichever is less.

15 U.S.C. §1673(a).<sup>6</sup>

The debtor's "net yearly income is \$8,761.00," *see* p. 2 of Debtor's Brief, which is paid over 10 months of the year. Thus her weekly "disposable earnings" are roughly \$219, which under §1673(a)

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<sup>4</sup>It is undisputed that the Debtor's non-income assets are exempt, and therefore not subject to levy.

<sup>5</sup>Section 1672(b) of Title 15 defines "disposable earnings" as "that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld."

<sup>6</sup>Although states are free pursuant to 15 U.S.C. §1677(1) to restrict garnishment to a greater extent than does §1673(a), the only such law that Michigan has enacted is irrelevant here. *See* Mich. Comp. Laws §600.4031(2)(a) (restricting garnishment on money that is "owed to the principal defendant on account of . . . the sale to the garnishee of milk or cream").

could be garnisheed to the extent of approximately \$54.75.<sup>7</sup> Because this is not a *de minimis* amount, the Debtor is by no means judgment-proof, and the *Johnson* analysis therefore becomes relevant.

Under *Johnson*'s mechanical test, the court must decide whether the debtor has the wherewithal to pay the student debt and maintain herself "at a subsistence or poverty standard of living." *Johnson*, 5 B.C.D. at 544. However, I think the inquiry is more appropriately defined as whether the debtor is able to maintain herself at a "minimal standard of living," the terminology found in §523(a)(8)'s legislative history, rather than speaking in terms of a "subsistence or poverty" standard. *See Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. II at 140-41 n.17 (1973) ("The total amount of income . . . should be adequate to maintain the debtor and his dependents, at a minimal standard of living . . . , as well as to pay the educational debt."); *see also Brunner v. New York State Higher Educ. Servs.*, 831 F.2d 395, 396 (2d Cir. 1987) (a determination of undue hardship "requir[es] a . . . showing . . . that the debtor cannot maintain . . . a 'minimal' standard of living for herself and her dependents if forced to repay the loans"); *In re Wegfehrt*, 10 B.R. 826, 830 (Bankr.

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<sup>7</sup>The current minimum hourly wage is \$4.25. *See* 29 U.S.C. §206(a)(1). Thirty times that figure is \$127.50, which is \$91.50 less than \$219. Twenty-five percent of \$219 is \$54.75, which is less than \$91.50.

N.D. Ohio 1981) ("The bankruptcy court must determine whether there would be anything left from the debtor's estimated future income to enable the debtor to make some payment on his/her student loan without reducing what the debtor and his/her dependents need to maintain a minimal standard of living.").

In this case, the Debtor is expending only a modest amount--approximately \$764.00 per month--for food, rent, transportation, clothing, medical costs, and telephone service. *See* Debtor's Exhibit G. Yet her income is so low that it does not permit her to purchase products or services other than these basic necessities, or to build up any kind of reserve or "nest egg" to provide for future contingencies.<sup>8</sup> She does not have any significant assets that could be sold, with the proceeds applied to the student loans. *Cf. In re Courtney*, 79 B.R. 1004, 1015, 18 C.B.C.2d 1040 (Bankr. N.D. Ind. 1987) ("[T]hese items [i.e., a mobile home and a boat] could be liquidated and sold or encumbered and the proceeds used to pay this student

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<sup>8</sup>Exhibit G, a copy of the Debtor's Schedule J (Current Expenditures of Individual Debtors), also lists \$30 for "Recreation, clubs and entertainment, newspaper, magazines, etc," as well as \$25 for "Haircare and miscellaneous." While one might legitimately argue that such expenses are inconsistent with a "minimal" living standard, I need not address the issue here. The Debtor's net annual income, augmented by the money she earns for babysitting (approximately \$300 per year), totals only \$9,061, or roughly \$755 a month. Thus even if the Debtor were to trim every ounce of "fat" from her budget, her expenditures for basic needs would still exceed her take-home pay.

debt without imposing an undue hardship on the Debtor and his dependents." ). And based on the Debtor's un rebutted testimony, I find that her income is not likely to increase substantially in the foreseeable future. *See Johnson*, 5 B.C.D. at 544. Because the Debtor is just able to maintain what I consider to be a minimally acceptable standard of living, it is clear under the circumstances that any payment made by her on the student debts would necessarily force her to live below that standard. The Debtor therefore passes the mechanical test.<sup>9</sup>

Turning to the second prong of *Johnson's* test, I must determine whether the Debtor has been "negligent or irresponsible in [her] efforts to minimize expenses, maximize resources, or secure employment." *Id. See also Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. II at 140 n.16

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<sup>9</sup>Since I have found that the Debtor cannot maintain a minimal living standard even were she to make no payments to TERI or MHEA, I need not address the interesting issue, raised at trial, concerning whether the Court has authority under §523(a)(8)(B) to reduce the Debtor's indebtedness or otherwise modify her payment terms so as to eliminate any undue hardship. *See generally In re Silliman*, 144 B.R. 748, 752 (Bankr. N.D. Ohio 1992) (collecting cases).

For the same reason, I need not decide whether each of the two creditors' debts should be considered separately from the other (i.e., whether payment of the MHEA debt, but not the TERI debt, would present an undue hardship, and vice versa), or whether it is appropriate to prorate the nondischargeable portion of the total indebtedness among the two creditors should the Debtor be able to pay some, but not all, of the \$43,000 debt without experiencing undue hardship.

(1973) (stating that "in some circumstances the debtor, *because of factors beyond his reasonable control*, may be unable to earn an income adequate both to meet the living costs of himself and his dependents and to make the educational debt payments" (emphasis added)). In support of its contention that the Debtor has acted irresponsibly under the circumstances, MHEA argued that the Debtor "look[s] for work . . . only . . . in her chosen field without considering the possibility that jobs exist in other persuasions which could pay substantially more than" does the Debtor's current employer. P. 3 of MHEA's Brief.

If the Debtor were not currently employed on a full-time basis in the field of education, I might be persuaded by MHEA's argument that she should expand her job search to include positions not related to that field. But I believe it is unreasonable for this Court to in effect require the Debtor to abandon her current position--a position which allows her to utilize her advanced training and expertise--in favor of employment that does not call upon her specialized skills. Thus even if I assume that there are better-paying non-educational jobs which the Debtor could secure--and neither MHEA nor TERI submitted evidence to support that assumption--I reject MHEA's contention that the Debtor's failure to seek such employment constitutes bad faith on her part.

Approaching the issue from a somewhat different tack, TERI

argued that the Debtor "fail[s] the 'good faith test' . . . [because], while demonstrating a past history of proficiency [in] secretarial work, [she] has made no effort to supplement her income by using those skills." P. 7 of TERI's Brief. To the extent TERI means to suggest that the Debtor should quit her teaching job and work as a secretary, I dismiss this argument for the reason already discussed. If TERI is instead arguing that the Debtor should "moonlight" by working as a secretary, say, on weekends or weekday evenings, I am still unconvinced. Taking into account the fact that the Debtor babysits during the summer months, she works approximately 40 hours per week throughout the year. She should not be required to do more than that as a sign of good faith.

While the Debtor may not be doing everything in her power to maximize her earnings, I am satisfied from her testimony that she has acted responsibly in this regard. I likewise find that the Debtor has made a conscientious effort to minimize her expenses: Although her budget includes some non-essential items, *see supran.* 8, she has only one car, a 7-year old Buick with some 98,000 miles on it, and she cuts down substantially on her housing costs by living with a roommate. *Johnson's* "good faith test" is therefore satisfied.<sup>10</sup>

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<sup>10</sup>TERI pointed out in its brief that, in making the good-faith determination, some courts consider "whether the debtor has made a bona fide attempt to repay the loan and whether the debtor's

The third and final prong of the *Johnson* test calls for a two-part inquiry: whether "the dominant purpose of the bankruptcy petition was to discharge the student debt," and whether "the debtor has definitely benefited financially from the education which the loan helped to finance." *Johnson*, 5 B.C.D. at 544. But for the reasons stated in *Courtney, supra*, this "policy" test is inappropriate and thus will not be applied. See *Courtney*, 79 B.R. at 1013 ("The policy test[] . . . goes beyond the language of [§523(a)(8)], and requires the Court to often indulge in all kinds of conjecture and

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misfortune was self-imposed by mismanagement of her financial affairs." *Silliman*, 144 B.R. at 751 (citing *In re Briscoe*, 16 B.R. 128, 131 (Bankr. S.D. N.Y. 1981)). With respect to the latter consideration, I do not think that a history of poor financial decisionmaking is relevant to the undue-hardship inquiry (except, of course, to the extent that the decisions are reflected in wasteful or excessive current expenses by the debtor, a factor already taken into account by *Johnson's* "good faith" test). Since that inquiry focuses primarily on the debtor's present and anticipated future circumstances, one might also question whether a "bona-fide attempt to repay the loan" before seeking the discharge in bankruptcy is an appropriate consideration. But even if I assume that it is, there is no indication here that the Debtor's failure to keep current on her loan payments reflects anything more than the fact that she simply was financially unable to do so. Lastly, I reject TERI's suggestion, arguably supported by *Brunner v. New York State Higher Educ. Servs.*, 831 F.2d 395, 397 (2d Cir. 1987), to the effect that the Debtor's failure to seek a deferment or otherwise attempt to restructure the TERI loan payments evinces bad faith on her part. Cf. *In re Powelson*, 25 B.R. 274, 275 (Bankr. D. Neb. 1982) ("[D]efendant [lender] suggests that other avenues for payment of this [student] loan must be explored . . . . The defendant suggests renegotiation or deferment. I reject the suggestion that this Court superimpose on [§523(a)(8)] additional burdens.").

speculation which often leads to conflicting and inequitable results based on many subjective factors."); *see also In re Roberson*, No. 92-2103, 1993 U.S. App. LEXIS 18517, at \*13 (7th Cir. July 20, 1993) ("If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow."); *In re Silliman*, 144 B.R. 748, 752 (Bankr. N.D. Ohio 1992) (refusing to consider "the benefit the debtor derived from the education financed by the student loans"); *In re Bryant*, 72 B.R. 913, 915 n.2 (Bankr. E.D. Pa. 1987) ("[T]he fact that the Debtor seeks to discharge almost exclusively student loan obligations in his bankruptcy should be irrelevant . . . in a §523(a)(8)(B) analysis.").

Because the Debtor meets the first two prongs of the *Johnson* test, I conclude that the debts at issue here are dischargeable under the undue-hardship exception provided by §523(a)(8)(B). A judgment shall enter for the Debtor.

Dated: August 17, 1993.

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ARTHUR J. SPECTOR  
U.S. Bankruptcy Judge